GOVERNOR GREG ABBOTT

TREVOR W. EZELL
General Counsel

(512) 463-3329
Trevor.Ezell@gov.texas.gov

November 3, 2025

Via E-Filing

Mr. Blake Hawthorne, Clerk
Supreme Court of Texas

Re: No. 25-0674, *In re Abbott*

Dear Mr. Hawthorne:

I write in response to the amicus brief filed on October 30th. Perhaps because Wu failed to engage with the Governor's historical arguments, Gov.Reply.26–28, Amicus now attempts to paper over that omission. He enlists counsel who previously represented Wu and the House Democratic Caucus during the 2021 quorum break to submit what amounts to a supplemental brief—two months after Wu's brief deadline and well after the Governor submitted his reply. *See* Texas House Democratic Caucus, Press Release, *House Democrats, Legislative Caucuses, State Employees, Texas AFL-CIO Petition Supreme Court* (June 25, 2021), https://tinyurl.com/3d4452yk ("The Texas lawmakers are represented by Chad Dunn of Brazil & Dunn and … Kevin Vickers of Brady & Peavey."); Docket, *In re Turner*, No. 21-0538 (Tex.) (listing Kevin Vickers as counsel for Wu and House Democratic Caucus).

Despite their apparent suggestion (at 1), neither Amicus's autobiography nor that of his counsel can convert policy preferences into law. The Texas Constitution is no respecter of persons. What matters is what the law says—not who claims the right to say it. And what the law says is clear: Under our Constitution, the Legislature gave this Court quo warranto authority to oust "any officer of state government" who forfeits

his office, except for the Governor and the Court of Criminal Appeals. TEX. GOV'T CODE § 22.002(a); TEX. CONST. art. V, § 3(a). Amicus cannot conjure a legislative carveout the actual Legislature chose not to include.

What Amicus offers in support of this *post hoc* rewrite is both irrelevant and non-responsive. The brief spends the first 30 pages discussing the Texas Constitution's numerical threshold for a quorum. The Governor, of course, has never disputed that the Legislature requires two-thirds to do business. Even so, Amicus sets sail to discover an anti-majoritarian "spirit of the times," pointing (at 2–11, 23–28) to legislative history, sometimes about different provisions entirely. Just this year, the U.S. Supreme Court warned against this sort of purposivism, for "no law pursues its purposes"—not even an anti-majoritarian one—"at all costs." *Advocate Christ Med. Ctr. v. Kennedy*, 605 U.S. 1, 19 (2025) (formatting modified). What matters is *how* the law pursues a stated purpose. *Ibid.*

The important question, then, is what the Quorum Clause means. Does the numerical prerequisite create a "right" or a "power" to cheat and to disregard the duties that a legislator swears an oath to fulfill? Or does it, instead, impose a duty on the legislator, while ensuring legislation has widespread consideration before enactment? Like Wu before him, Amicus could not be bothered to discuss century-old Supreme Court precedent embracing the latter view. *See* Gov.BOM.42–43 (quoting *United States v. Ballin*, 144 U.S. 1, 9 (1892) ("the requirement of a quorum at that time was not intended to furnish a means of suspending the legislative … duty of a quorum.") (formatting modified)); Gov.Reply.24–26. The idiom that "rules were meant to be broken" is ironic only because the breaking of a rule is *not* normative: Quorum breaking—like speeding—is a manifest violation of our law, not a law unto itself. *See* Gov.BOM.41.

Amicus nevertheless attempts to recast that violation as law by pointing (at 12–23) to quorum breaks, mostly in other States. But past sins do not justify future transgressions. There is no "adverse-possession theory" of interpreting our founding charter. *N.L.R.B. v. Noel Canning*,

573 U.S. 513, 615 (2014) (Scalia, J., concurring in judgment). Much more probative than the mere fact of quorum breaks occurring is that such breaks were *perceived* in Texas—whether in the 1870s or the 1970s—as abdicating legislative duties. Gov.BOM.45–48; Gov.Reply.27–28. Amicus has no answer, even though the examples he cites were far milder than Wu's. For instance, he describes (at 21–22) an 1856 episode where the Texas House "adjourned for the night, and a quorum was reached *the following morning*." Now, with two months for additional research, Amicus still identifies no episode involving a legislator like Wu, who (1) fled the sovereign territory of Texas (2) to evade the disciplinary jurisdiction of the Texas House (3) for an avowedly indefinite period of time (4) in exchange for money (5) for the stated purpose of "killing" an entire legislative session (6) in order to negotiate with other sovereign governments (7) all pursuant to a claim of constitutional "right." Gov.BOM.4–16, 50–51; *contra* TEX. CONST. art. III, §§ 5, 10, 40; *id.* art. IV, § 10; *id.* art. XVI, §§ 1, 41.

Eventually, Amicus argues (at 28–39) that the Legislature has exclusive authority to punish quorum breaking. That argument has the virtue of being relevant, but in substance is not responsive to the Governor's briefing. In two pages (at 28–29), Amicus simply recites the tools that Article III gives the Legislature—*i.e.*, that each house "*may* … compel the attendance of absent members" and "*may* … expel a member." In two more pages (at 34–35), Amicus recounts how some legislatures have used those tools before. Missing entirely is any effort to show how those tools preclude quo warranto—even though the Quorum Clause and the Punishment Clause both use permissive, not exclusive, language.

Buried in a footnote (at 39 n.40), Amicus unwittingly concedes the point by citing *Errichetti v. Merlino*, 457 A.2d 476 (N.J. Super. Ct. Law. Div. 1982). There, the court upheld a New Jersey statute that ousted a sitting Senator for his tenth unexcused absence from a legislative session. *Id.* at 480. At every turn, that case hurts Wu and supports the Governor. First, *Errichetti* held that "a member of the Legislature is

included within" the term "'State officers.'" *Id.* at 485; *see* Gov.BOM.20–24; Gov.Reply.3–4. Second, the court found that the common-law duty to discharge a public office "without neglect of duty" imposed an obligation to attend legislative sessions. 457 A.2d at 486 (citing 63 AM. JUR. 2D, *Public Officers and Employees* § 190 at 744); *see* Gov.BOM.38–44, 51–53. Third, the court eschewed a reading that would "afford a shield to a wrongdoing legislator" that the Constitution "was not intended" to provide. 457 A.2d at 484–485; *see* Gov.BOM.64–65 (arguing Wu cannot "hide behind … remedies" he rendered worthless). Fourth, Amicus's observation that the New Jersey statute could itself be viewed as an exercise of the Legislature's removal power walks into the Governor's contention that Section 22.002(a) could be viewed the same way. *See* Gov.BOM.63. Finally, and most importantly, *Errichetti* rejected an exclusive remedies theory, reasoning that the New Jersey Constitution's similarly worded Punishment Clause "contains no grant … of exclusive authority" and could not be read to imply one. 457 A.2d at 484; *compare* N.J. CONST. art. IV, § 4, cl. 3, *with* TEX. CONST. art. III, § 11.

The law sometimes establishes one remedy as exclusive, but it does so by specifying "expressly" that the remedy provided excludes all others. *Southland Corp. v. Lewis*, 940 S.W.2d 83, 84 (Tex. 1997) (per curiam). Accordingly, courts do not imply exclusivity. *See, e.g.*, *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 453–454 (Tex. 2002) (Phillips, C.J., authoring) (Dram Shop Act did not impliedly bar common law claims); *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 18 (Tex. 2000) (Phillips, C.J., joining) (positive law "did not clearly divest … common-law remedies"). That is especially true where: the Governor does not seek to compel Wu's attendance, Gov.BOM.19 n.1, 61; the quo warranto statute's plain terms apply broadly to "any officer of state government" except the Governor and the CCA, Gov.BOM.30–32; and any effort to artificially narrow a common-law writ runs headfirst into this Court's precedents on the open courts guarantee, Gov.BOM.63 (citing *Sax* and *Thomas*). Far from

presuming that Article III's tools are exclusive, Wu needed to overcome a constitutional presumption the other way, favoring concurrent tools.

He failed to do so. Any jurist knows that a single act may give rise to overlapping legal consequences. A fraudulent misrepresentation may result in criminal liability, TEX. PENAL CODE § 32.22; at the same time, it may support treble damages under the DTPA, TEX. BUS. & COM. CODE § 17.12. Nothing about Wu's former status as an elected official changes this basic principle. Amicus, of all people, ought to understand that. During his tenure as Chief Justice, he appointed a review tribunal that acknowledged "concurrent remedies" *in the context of removing a public official*. *See In re Lowery*, 999 S.W.2d 639, 649–650 (Tex. Rev. Trib. 1998, rev. den.) ("Although the Constitution provides multiple methods for removal of a judge, none is an exclusive remedy and more than one may be pursued concurrently."); TEX. CONST. art. V, § 1-a(9) (review tribunal is appointed "by the Chief Justice of the Supreme Court"). Just last year, Amicus advocated for concurrent remedies in a different context and this Court agreed. *See* Pet. at 9–16, No. 22-0846 (Tex. Nov. 21, 2022), approved in *Westwood Motorcars, LLC, v. Virtuolotry, LLC*, 689 S.W.3d 879, 883 (Tex. 2024).

The Legislature's internal discipline and the judiciary's quo warranto authority likewise sit side by side. Gov.BOM.62. Nothing in our Constitution precludes this Court from making a *de iure* recognition of a *de facto* reality, as courts have for centuries. Wu chose to no longer serve as a representative. This Court should honor that choice and order his ouster, rather than pave the way for future abdicant officers to arrest the legislative branch and usurp the functions of the judiciary and executive.

Respectfully submitted.

/s/ Trevor W. Ezell
TREVOR W. EZELL
General Counsel
Texas Bar No. 24109849
Trevor.Ezell@gov.texas.gov

Office of the Governor
P.O. Box 12428
Austin, Texas 78711
(512) 936-3329

Counsel for Greg Abbott, in his official capacity as Governor of the State of Texas

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/s/ Trevor W. Ezell
TREVOR W. EZELL
Counsel for Greg Abbott, in his official capacity as Governor of the State of Texas

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TREVOR W. EZELL
Counsel for Greg Abbott, in his official capacity as Governor of the State of Texas

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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Scott Brazil		scott@brazilanddunn.com	11/3/2025 12:59:13 PM	SENT
Kirsten Castaneda	792401	kcastaneda@adjtlaw.com	11/3/2025 12:59:13 PM	SENT
Alexandra Albright	21723500	Aalbright@adjtlaw.com	11/3/2025 12:59:13 PM	SENT
Justin Nelson	24034766	jnelson@susmangodfrey.com	11/3/2025 12:59:13 PM	SENT
Anna Baker	791362	abaker@adjtlaw.com	11/3/2025 12:59:13 PM	SENT
Hannah Roblyer	24106356	hroblyer@adjtlaw.com	11/3/2025 12:59:13 PM	SENT
Wolfgang P.Hirczy de Mino		wphdmphd@gmail.com	11/3/2025 12:59:13 PM	SENT
Stacey Jett		sjett@adjtlaw.com	11/3/2025 12:59:13 PM	SENT
Mandy Patterson		mpatterson@adjtlaw.com	11/3/2025 12:59:13 PM	SENT
Jonathan F.Mitchell		jonathan@mitchell.law	11/3/2025 12:59:13 PM	SENT
Wolfgang pHirczy de Mino		wphdmphd@gmail.com	11/3/2025 12:59:13 PM	SENT
Chad Dunn		chad@brazilanddunn.com	11/3/2025 12:59:13 PM	SENT
Jonathan Fombonne		jonathan.fombonne@harriscountytx.gov	11/3/2025 12:59:13 PM	SENT
Tiffany Bingham		tiffany.bingham@harriscountytx.gov	11/3/2025 12:59:13 PM	SENT
Rebecca Gonzalez-Rivas	24145204	bgonzalezrivas@adjtlaw.com	11/3/2025 12:59:13 PM	SENT
Trevor Ezell		trevor.ezell@gov.texas.gov	11/3/2025 12:59:13 PM	SENT
Amy Ruzicka		amy.ruzicka@gov.texas.gov	11/3/2025 12:59:13 PM	SENT
Gene Wu		gene.wu@house.texas.gov	11/3/2025 12:59:13 PM	SENT
Jeri Hamman		jeri.hamman@solidcounsel.com	11/3/2025 12:59:13 PM	SENT
Dana Orsini		dana.orsini@solidcounsel.com	11/3/2025 12:59:13 PM	SENT
Mitch Little		mitch.little@solidcounsel.com	11/3/2025 12:59:13 PM	SENT
Amy Warr		awarr@adjtlaw.com	11/3/2025 12:59:13 PM	SENT
Mimi Marziani		mmarziani@msgpllc.com	11/3/2025 12:59:13 PM	SENT
Joaquin Gonzalez		gonzalez@msgpllc.com	11/3/2025 12:59:13 PM	SENT

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Case Contacts

Joaquin Gonzalez		gonzalez@msgpllc.com	11/3/2025 12:59:13 PM	SENT
Beth Stevens		bstevens@msgpllc.com	11/3/2025 12:59:13 PM	SENT
Jonathan F.Mitchell		jonathan@mitchell.law	11/3/2025 12:59:13 PM	SENT
John B.Scott		john.scott@scottpllc.net	11/3/2025 12:59:13 PM	SENT
Katy Peaslee		kpeaslee@susmangodfrey.com	11/3/2025 12:59:13 PM	SENT
Gwen Kelly		gwen@brazilanddunn.com	11/3/2025 12:59:13 PM	SENT
Christopher Garza		Christopher.Garza@harriscountytx.gov	11/3/2025 12:59:13 PM	SENT
Jesse Blakley		Jesse.Blakley@harriscountytx.gov	11/3/2025 12:59:13 PM	SENT
Eleanor Matheson		eleanor.matheson@harriscountytx.gov	11/3/2025 12:59:13 PM	SENT